was not a man less in the mines because of defendant's failure to provide the safeguard of a light on the front of moving cars. Hence the precautions which the Legislature regards obviously necessary to safety it places out of the domain of waiver by the employee or of contract, either express or implied, between the parties, and requires such precautions as a matter of public policy, under the sanction of penalties inflicted for failure to provide them."

If the conclusion as reached by the Virginia Court is not correct, then as truly said by Judge Sims, in delivering the opinion of the Bates Case,[17] "the statute may be nullified and set at naught by the flagrant and systematic violation of it."

R. C. S.

MEASURE OF DAMAGES—*P. Lorillard Co.* v. *Clay* (Va.), 104 S. E. 384.—The plaintiff below suffered the loss of an eye during the course of his employment by the defendant company. The decision of the case in favor of the plaintiff and the award of $15,000 in damages was the subject of review by the Supreme Court of Appeals. The chief contention upon which the appeal was based and a new trial asked, was that the jury had been prejudiced by the improper arguments of counsel, tending to array labor against capital, men against corporations, etc. The Appellate Court, reviewing the amount of damages awarded for similar injuries, and approved by the supreme courts of other States, decided that the jury had been led by the improper arguments of counsel to award excessive damages, and, refusing to remand for new trial, reduced the verdict to $10,000.

This decision is severely criticized in 6 VA. L. REG. (N. S.) 618. It is there remarked that decisions in other States as to what constitutes compensation for the loss of an eye can have no bearing upon a particular case in this State. The proper action, it is thought, would have been to set the case aside for new trial —"not upon the measure of damages, but upon the fact that the jury was prevented from being impartial by the arguments used by counsel."

It is hard to see how the court, avowedly convinced that the jury did not err in fixing the *existence of liability* on the part of the defendant, would have been justified in ordering a new trial. The court is, itself, in as good a position to determine the *extent of the liability* as a new jury would be. It seems to us that the court was in duty bound not to order a new trial, but, if convinced that the verdict was excessive, due to the improper arguments of counsel, simply to reduce it, and end the matter there.

We agree that the decisions in other States are ordinarily of little value in fixing damages in a particular case in Virginia. But

[17] *Supra.*

the court has not implied that such criterion does away with the latitude which is essential for the proper handling of special cases. It truly observes that there can be no such thing as true monetary compensation for the loss of an eye. What, in an ordinary case, then, is fair? An average of the opinions of many courts is, to say the least, not a bad criterion. Finding that the jury in this case has awarded three times that average, and knowing that the jury has heard prejudicial argument, the original verdict was cut—not by two-thirds—but by one-third only. We think the court eminently justified.

T. L. P.

INDEPENDENT CONTRACTOR—CORPORATION NOT LIABLE FOR NEGLIGENCE OF PHYSICIAN EMPLOYED BY IT.—In the recent Virginia case of *Virginia Iron, Coal & Coke Co.* v. *Odle*,[1] the question arose as to the liability of a corporation for the negligence of a physician whom it employed. In that case the corporation deducted, from the wages of each of its employees, a sum in consideration of which, any sick or injured employee was entitled to the services of a physician free from any further charge. The corporation did not make any profit from this transaction. The court held that the physician was an independent contractor, and the corporation was not liable for his negligence, but was only bound to use ordinary care in the selection and retention of the physician.

It is well settled that a physician is an independent contractor,[2] but the liability of a corporation is dependent upon different sets of facts. When the services of a physician are furnished as a pure gratuity the master is only liable for the use of ordinary care in selecting him.[3] Also when the sum deducted from the wages of its employees is paid in full to a physician of its own selection, the corporation is only liable for ordinary care in his selection.[4] By the weight of authority the same duty rests upon the corporation when no profit or expectation of profit is derived from a fund obtained by deductions from the wages of its employees.[5] Pertaining to the question of ordinary care, it has been held that where a case necessitates two physicians, ordinary

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[1] 105 S. E. 107.

[2] Union Pacific R. Co. *v.* Artist, 60 Fed. 365, 23 L. R. A. 581.

[3] Quinn *v.* Kansas City, etc., R. Co., 94 Tenn. 713, 30 S. W. 1036, 28 L. R. A. 552, 45 Am. St. Rep. 767.

[4] Wells *v.* Ferry-Baker Lumber Co., 57 Wash. 658, 107 Pac. 869, 29 L. R. A. (N. S.) 426.

[5] Big Stone Gap Iron Co. *v.* Ketron, 102 Va. 23, 45 S. E. 740, 102 Am. St. Rep. 839; Arkansas, etc., R. Co. *v.* Pearson, 98 Ark. 399, 135 S. W. 917, 34 L. R. A. (N. S.) 317; Poling *v.* San Antonio, etc., R. Co., 32 Tex. Civ. App. 487, 75 S. W. 69; Congdon *v.* Louisiana Sawmill Co., 143 La. 209, 78 So. 470. But see Phillips *v.* St. Louis, etc., R. Co., 211 Mo. 419, 111 S. W. 109, 17 L. R. A. (N. S.) 1167, 124 Am. St. Rep. 786, 14 Ann. Cas. 742.